No. 78-1177

In the Supreme Court of the United States

OCTOBER TERM, 1978

WHITE MOUNTAIN APACHE TRIBE, ET AL.,
PETITIONERS

v.

ROBERT M. BRACKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of March 19, 1979.

QUESTION PRESENTED

Whether Arizona may impose a motor carrier license tax and a use fuel tax on a non-Indian enterprise whose activities occur exclusively on an Indian reservation and consist of felling, loading and trans-

porting within the reservation timber held by the United States in trust for the tribe.

STATEMENT

Petitioners are the White Mountain Apache Tribe, a federally recognized Indian tribe, and "Pinetop Logging Company," a business enterprise made up of two non-Indian corporations organized under the laws of Oregon. They brought this action in state court to challenge the applicability of Arizona's motor carrier license tax and use fuel tax to Pinetop's logging operations, which take place entirely on the White Mountain Apache Reservation. Respondents are the Arizona Highway Department, the Arizona Highway Commission, and individual members of each (Pet. App. 24a-1).[1]

Pinetop has a contract with the Fort Apache Timber Company (FATCO), the Tribe's business organization, for the management, harvesting, milling, and sale of tribal timber (Pet. App. 25a to 25a-1). The contract authorizes Pinetop to fell and load timber that is owned by the United States for the benefit of the tribe, and to transport it within the reservation to a tribal lumber mill (*ibid.*). In 1971, the Arizona Highway Department, pursuant to Ariz. Rev. Stat. Ann. § 40-641 (1974) and Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978), sought to collect a motor carrier

[1] The First Amended Complaint also named the governor, the attorney general, the state corporation commission, and its members, but those defendants were subsequently dismissed (Pet. 12 n.5).

license tax equivalent to 2.5% of Pinetop's gross receipts from its common carrier operations and an excise tax in the amount of 8 cents per gallon of diesel fuel used in Arizona by Pinetop's motor vehicles (Pet. App. 26a).

After Pinetop paid the taxes under protest[2] it brought this action in state court for a refund, contending that Pinetop was immune from the state fuel tax and motor vehicle carrier gross receipts tax because its hauling activities took place exclusively on the reservation where Pinetop traveled on Tribal and BIA roads (Pet. 11).[3] The Tribe was subsequently named as a co-plaintiff when Pinetop filed an amended complaint (Pet. App. 1a-18a). Petitioners filed an affidavit by the manager of FATCO stating that when the contract between Pinetop and FATCO was negotiated, the parties believed that Pinetop would not be liable for state taxes, and that when Arizona attempted to levy these taxes FATCO was obliged to agree to reimburse Pinetop for any taxes it was required to pay in order to avoid the loss

[2] Between November 1971 and May 1976 Pinetop paid, under protest, $19,114.59 in use fuel taxes and $14,701.42 in motor carrier license taxes, and since that time it has continued to pay additional amounts under protest pending the outcome of the litigation (Pet. 11).

[3] In a few locations on the reservation Pinetop's vehicles travel on state highways. Pinetop has maintained records of the fuel attributable to the travel on these highways, and it concedes its liability for the tax attributable to that travel (Pet. 8, 11).

of Pinetop's services (Pet. App. 26a; A.R. 110-111).[4] The manager also stated that FATCO had five other logging contractors, and that FATCO would be obliged to reimburse them as well for any state taxes (A.R. 111).

The trial court granted summary judgment for the state defendants (Pet. App. 19a-23a), holding that the state taxes were lawfully imposed on Pinetop, and that Pinetop was not entitled to claim the "pulpwood exemption" from the common carrier license tax provided by Ariz. Rev. Stat. Ann. § 40-601(A)(10) (1974).

The Tribe and Pinetop appealed to the state court of appeals, which affirmed the trial court's conclusion that Pinetop was subject to the state taxes, but reversed the portion of the trial court's decision holding that Pinetop could not claim the pulpwood exemption, which the appellate court found to be applicable to 60% of Pinetop's gross revenues (Pet. App. 24a-33a). The state supreme court declined to review the intermediate appellate court's decision (Pet. App. 37a).

DISCUSSION

1. a. Petitioners' primary contention (Pet. 14-25) is that the state taxes in question are preempted

[4] "A.R." refers to the abstract of the record filed in the state intermediate appellate court. Despite the Tribe's contention that it would be obliged to reimburse Pinetop for any taxes owed, the state appellate court observed that although the Tribe was a "nominal party to this action," it had never paid any taxes nor had the state ever attempted to collect any taxes from it (Pet. App. 24a-1 n.1).

by the comprehensive federal regulation of the harvest and sale of tribal timber. As petitioners point out (Pet. 19-24), the United States holds title to all timber on reservation lands. Statutory authorization is required for the harvesting of timber on these lands, because the growing timber may be considered a portion of the fee interest, and its sale may constitute a realization of the major portion of value of the fee estate. Cf. *Squire* v. *Capoeman*, 351 U.S. 1, 10 (1956).[5]

General statutory authorization for the harvesting of mature timber on unallotted Indian land, pursuant to "the principles of sustained yield" and "under regulations to be prescribed by the Secretary," has been enacted, 25 U.S.C. 407, 466, in order to provide a source of tribal income as well as opportunities for Indian employment. See H.R. Rep. No. 1135, 61st Cong., 2d Sess. 3 (1910). The regulations prescribed by the Secretary pursuant to Section 407 state that the objectives of managing unallotted lands according to the principles of sustained yield include not only "[t]he preservation of such lands in a perpetually productive state," but also "[t]he development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end

[5] See 1 G. Thompson, *Commentaries on the Modern Law of Real Property* §§ 97, 104 at 401-404, 439-440 (1964). In *Squire* v. *Capoeman, supra*, this Court held that 25 U.S.C. 348, which prohibits any "charge" or "encumbrance" on an allottee's interest, precluded the application of the federal capital gains tax to the proceeds of timber sales.

that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform." 25 C.F.R. 141.3(a)(1), (3). Because of this pervasive federal regulation and strong federal interest in timber production on reservation lands, at least one lower court has concluded that state commercial law is preempted, and federal law governs timber contracts between tribal entities and lumber logging companies. *In re Humboldt Fir, Inc.*, 426 F. Supp. 292 (N.D. Cal. 1977).

Petitioners contend (Pet. 18) that here, as in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 691 (1965), the imposition of a state tax is preempted because it "would put financial burdens on" the non-Indian business or trader "in addition to those Congress or the Tribes have proscribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians * * *." Petitioners also urge (Pet. 9-10) that both the fuel tax and the motor carrier gross receipts tax are intended to compensate for the use of state owned and maintained highways; indeed Ariz. Rev. Stat. Ann. § 28-1552 expressly states that the fuel tax is imposed "[f]or the purpose of partially compensating the state for the use of its highways." Since the only taxes at issue here are those imposed in connection with Pinetop's use of roads constructed and maintained by the Tribe and BIA, for which no

state funds are expended (A.R. 102),[6] petitioners argue that here, as in *Warren Trading Post*, there is no reason to assume that the state has "the privilege of levying this tax" when it has "no duties or responsibilities." 380 U.S. at 691.

Finally, petitioners make the related contention (Pet. 34, quoting Pet. App. 31a) that the imposition of the state taxes impermissibly infringes on the Tribe's right to self-government because it conditions the Tribe's ability to use non-Indian assistance in harvesting the timber on the payment of the state taxes, adversely affects the Tribe's "economic development," and limits the Tribe's ability to "tax the same activities." The profits from the tribal timber enterprise constitute the primary source of tribal revenue. According to the affidavits petitioners filed in the trial court, FATCO's net profits in 1973 were $1,508,713, the lion's share of the total profits of $1,667,091 from all tribal enterprises (A.R. 98). Additionally, FATCO provided employment for approximately 300 members of the Tribe (*ibid.*).

b. Although this is the first case, to our knowledge, that presents the question whether the states' taxing jurisdiction is preempted by the federal regulation of timber harvesting on reservation lands, similar preemption claims based on *Warren Trading Post* and claims of interference with tribal self-government have been raised in a number of cases now pending before this Court and in the courts of appeals. The pending cases challenge the application

[6] See page 3 and note 3, *supra*.

of state transaction privilege taxes to monies paid by tribal enterprises for on-reservation services performed by non-Indians,[7] and to on-reservation sales by non-Indians to tribal enterprises,[8] the application of state cigarette and sales taxes to on-reservation sales by tribally licensed dealers to non-Indians,[9] and the application of state licensing fees to non-Indians hunting and fishing on reservation lands.[10] Despite

[7] In *Mescalero Apache Tribe* v. *Fred L. O'Chesky*, Nos. 77-2102, 77-2103 (10th Cir.), the Tribe contends that New Mexico cannot apply its transaction privilege tax to monies paid by the Tribe to non-Indian contractors for construction work performed on the reservation.

[8] An appeal from the judgment of the Supreme Court of Arizona is pending in *Central Machinery Co.* v. *State of Arizona*, No. 78-1604, on the question whether Arizona's transaction privilege tax may be applied to a BIA-approved on-reservation sale of farm machinery to an Indian tribe. And in *Navajo Tribal Utility Authority* v. *Arizona Department of Revenue*, No. 78-2895 (9th Cir.), the Tribe contends that the State may not impose its transaction privilege tax on the gross receipts from sales to a tribal entity of electricity that has been generated, transmitted, sold, and used solely within the reservation.

[9] In *State of Washington* v. *Confederated Tribes of the Colville Reservation*, No. 78-630, the Court has postponed further consideration of the question of jurisdiction and agreed to hear argument on the question whether Washington's cigarette and sales taxes are preempted or interfere with tribal self-government when these taxes are applied to on-reservation cigarette sales to non-Indians.

[10] A petition for a writ of certiorari is now pending in *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians*, No. 78-1653, on the question whether the imposition of state fishing license fees to non-Indians for on-reservation fishing is preempted or interferes with tribal self-government.

significant differences—in the federal statutes and regulations relied upon to show pervasive federal regulation, and whether the Tribe has or has not attempted to impose its own taxes on the transaction [11] —the several cases are closely related.

The common bond is that, in each instance, the state is attempting to extend its taxing or regulatory jurisdiction to on-reservation transactions and activities in which the state has little or no interest and over which it exercises little or no control (though a non-Indian party is also involved). In the present case, for example, the state seeks to impose fuel taxes and motor carrier gross receipts taxes that are designed to repay the state for the use of its highways, though the non-Indian logging company travelled only on Tribal and BIA roads for which the state has no responsibility. Similarly, another state sought to impose a fishing license tax on persons who fish in reservation streams that have been stocked with fish

[11] In *State of Washington* v. *Confederated Tribes of the Colville Reservation, supra*, the Yakima Tribe imposed a tax of 2.25 cents per package of cigarettes, and the three-judge district court found that imposition of both the tribal tax and the state cigarette tax on sales to non-Indians would make cigarettes sold by tribal retailers too expensive to be competitive with cigarettes sold off the reservation. And in *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians, supra*, where the tribal fishing license fee was $2.00, the state had eliminated one-day permits and required all fishermen to obtain a $5.50 state permit. As the court of appeals noted (588 F.2d 75, 77 (4th Cir. 1978)), "the combined fee of $7.50 for fishing permits for one day was a substantial deterrent to prospective fishermen."

hatched and raised by the federal government and placed in the reservation streams by federal agents in an attempt to provide the Tribe with a commercial fishing industry that will attract sport fishermen—the State having no conservation responsibility or other interest.[12]

The tribal enterprises in the cited cases provide a major source of tribal revenues. The claims of interference with tribal self-government, and to some extent the claims of preemption, are founded on the fact that the imposition of these state taxes—though technically imposed on the non-Indian parties to the transaction—is passed on to the tribal enterprise when it is the purchaser of goods or services, and will reduce revenues where the Tribe is the vendor, in some instances making the transactions so expensive that the Indian enterprise will be unable to compete with non-Indian enterprises. The imposition of state taxes also reduces the opportunity for the tribes themselves to impose similar types of taxes.

In our view, the question of the permissible limits of state taxation of on-reservation transactions involving non-Indians presents an important and frequently recurring issue that warrants resolution by this Court. None of the Court's previous decisions involves a situation where the economic burden of a tax nominally imposed on a non-Indian party will be

[12] See *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians, supra.*

borne by the Tribe.[13] For example, in *Thomas* v. *Gay*, 169 U.S. 264, 275 (1898), the Court found that the burden of a tax on cattle owned by a non-Indian lessee of reservation lands was "too remote and indirect" to be regarded as a tax on the Indian lessors. And in *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 481-482 (1976), the Court focused only on the claim that the burden of the state tax fell on the Indian cigarette retailers because they were required to collect the taxes at the time they made sales.

The instant case presents an appropriate vehicle to consider the reach of the states' taxing jurisdiction where the burden of the state tax falls on a tribal enterprise. Although the case was decided on summary judgment, the record includes a verified complaint, affidavits, and a deposition, all of which are to be taken as true in the present procedural posture of the case. Despite the fact that the state court suggested (Pet. App. 24a-1 n.1) that the Tribe was merely "a nominal party" because no taxes had been imposed on it, the verified complaint and the supporting affidavits allege that in order to secure Pinetop's continued services the Tribe had been ob-

[13] However, although the Court did not discuss this point in *Warren Trading Post*, the state court had upheld the application of the Arizona tax on the ground that its legal incidence fell on the trading post, not the Indian purchasers. *Warren Trading Post* v. *Moore*, 95 Ariz. 110, 113-114, 387 P.2d 809, 810-812 (1963). The Arizona tax considered in *Warren Trading Post* is the same tax now at issue in *Central Machinery Co.* v. *State of Arizona*, No. 78-1604, where the appellees likewise emphasize the fact that the legal incidence of the tax is not on the Tribe (Motion to Dismiss at 3-4).

liged to increase the contract payments to reimburse Pinetop for any state taxes it was required to pay (Pet. App. 9a; A.R. 111). Pinetop would also be required to do the same in the case of its other logging contractors (A.R. 111).

2. Petitioners also contend (Pet. 25-29) that Section 20 of the Arizona Enabling Act of 1910, ch. 310, 36 Stat. 569, which declares that Indian lands within Arizona shall be subject to the "absolute jurisdiction and control" of the federal government, deprives the state of regulatory jurisdiction and precludes the imposition of these taxes as a condition of using the Tribal and BIA roads to do business with the Tribe.[14]

In our view, this contention does not warrant review by this Court. In construing provisions of

[14] Finally, petitioners also contend (Pet. 30-33) that the imposition of the state tax conflicts with 25 C.F.R. 1.4(a), which states that, except as otherwise expressly provided, state laws "limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property" are not applicable to "property leased from or held or used under agreement with and belonging to any Indian or Indian tribe * * * that is held in trust by the United States * * *." The Secretary has never had occasion to consider the question whether a fuel tax or motor carrier tax on non-Indian vehicles operating on BIA or Tribal roads that are open to the public would constitute a state law "governing, regulating, or controlling the use or development" of tribal property. Certainly state motor carrier licensing and fuel tax laws were not within the Secretary's primary focus when he promulgated this regulation, which is aimed, at least in the main, at explicit land use control provisions such as zoning laws. So far as we can determine, this is the first case where petitioner's expansive construction of the regulation has been considered, and in our view this question does not—at least at present—warrant review by this Court.

other Enabling Acts that are virtually identical to Section 20 of the Arizona Enabling Act, this Court has made it clear that reservation lands are not wholly outside the jurisdiction of the states, because " 'absolute' federal jurisdiction is not invariably exclusive federal jurisdiction." *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 68 (1962), citing *Williams* v. *Lee*, 358 U.S. 217 (1959); *Draper* v. *United States*, 164 U.S. 240, 246 (1896). This Court's decisions "indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Organized Village of Kake* v. *Egan, supra*, 369 U.S. at 75. The Arizona Enabling Act simply preserved the preexisting balance between state and federal jurisdiction. If the imposition of the state taxes at issue here is not preempted and does not interfere with tribal self-government, it does not contravene the Arizona Enabling Act.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to questions 1, 2, and 5.[15]

Respectfully submitted.

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[15] For the reasons just stated, we agree with the appellant in *Central Machinery Co.* v. *State of Arizona*, No. 78-1604, that the applicability of the transfer privilege tax presents a substantial federal question, and accordingly probable jurisdiction should be noted. In order to have before it the several aspects of a common question, the Court may also deem it appropriate to grant certiorari in *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians*, No. 78-1653, and to set the several cases for argument following *State of Washington* v. *Confederated Tribes of the Colville Reservation*, No. 78-630.

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